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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 143.

THE BOARD OF TRADE OF KANSAS CITY, MO., J. F. LEAHY, R. E. SWENSON, G. A. JOHNSON ET AL., APPELLANTS,

VS.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF NORTH DAKOTA ET AL., APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

APPELLANTS' REPLY BRIEF.

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November 15, 1941.

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APPELLANTS' REPLY BRIEF.

I.

Immaterial and Irrelevant Matters Are Relied Upon by Appellees.

Appellees emphasize many matters which not only have no bearing on the material questions involved, but which are in fact misleading and tend to confuse the issues.

1. Undue emphasis on Commission's actions in First and Second Grain Cases.

Much of appellees' brief is devoted to a review of what the Commission did in the First and Second Grain Cases. The reasoning of the Commission is gone into in minute detail. Great emphasis is put upon all this detail and historical background, so that to a large degree one is apt to lose sight of the fact that the discrimination complained of arises not from the action of the Commission in the creation and fixing of proportional rates, but rather, from the fact that after the Commission had reached its principal conclusions and prescribed the rates, it then authorized a number of lower through rates and permitted the interior points to transit on such lower rates as well as upon the combinations, while restricting the primary markets to the higher combinations. These exceptions were allowed for the purpose of promoting carrier competition by enabling the carriers, whose lines constituted the so-called "indirect routes" to share in the available business. Appellees gloss over these facts, although the discrimination and prejudice complained of arose therefrom.

Moreover, the appellees, in emphasizing the findings in the *First* and *Second Grain Cases* entirely overlook the fact that subsequent to those decisions the Commission greatly increased and intensified the discrimination against the primary markets and, in order to do so, reversed, in part, its decision in those cases. In both those cases the Commission held that all interior points on routes through the rate-break markets should transit only on the combinations and not upon the lower through rates in order not to unduly discriminate against the rate-break markets. 164 I. C. C. 645 (R. 53), 173 I. C. C. 516 (R. 240). The Commission held that the fact that the primary markets, because of their location, drew grain from a wider territory and had the use of the lines of more carriers, did not afford "justification for a difference in treatment" (R. 240).

Subsequently it refused to follow said findings and rulings and held that all points on routes through the primary markets could transit on the lower through rates except the primary markets (R. 541).

2. The fact that the proportional rates are the average of transit balances does not result in any advantage to the primary markets over interior points.

Throughout the Appellees' brief and the brief of the Texas interveners, the contention is made that proportional rates are the average of transit balances and that therefore the primary markets are not damaged because they pay the average, while the interior points pay transit balances which may be high or low, depending upon the particular case. This contention, or insinuation and implication, that the primary markets pay an average of transit balances which may sometimes be lower and sometimes higher than the balances upon which interior points transit and that therefore the primary markets are not damaged, is erroneous and may mislead the Court.

The method used by the Commission in fixing the rate-break combinations on the primary markets from producing points to Chicago and St. Louis was to first determine reasonable through rates over the direct routes through the markets and then to break them back into inbound local rates and outbound proportional rates, on the basis of average relative distances, resulting in proportional rates, approximately the average transit balances that would have resulted if one-factor through rates with transit, in lieu of the rate-break combinations, had been prescribed. 205 I. C. C. 301, 328 (R. 305).

Reference to this has been made a number of times by the opposition in such a way as to imply that the primary markets are favored thereby.

The method of construction of the proportional rates is not significant even though it be by the averaging process. As has been repeatedly stated in our principal brief, both primary and interior points transit on the

combinations. Both pay the same through rates, except as to the exceptions which are lower. As to all but the exceptions, both primary and interior markets do business on the same basis, the only difference being that at primary markets the balance is known as a "proportional."

The rate-break combinations, of which the proportional rates constitute one factor, are the maximum rates prescribed by the Commission, and the primary markets are now required to transit exclusively on these rates, whereas interior points are permitted to transit, not only on the combinations, but also on lower through rates, where such rates exist.

It is not correct, therefore, to say that the primary market could transit on proportional rates when the transit balances are higher, because the transit balances never are higher. The rate-break combinations and the proportional rates which they are required to pay are always the same as or higher than the through rates and resulting transit balances on which interior points are permitted to transit.

No matter how the various factors of the combinations were determined, the combinations resulting therefrom are higher than the lower through rates upon which interior points may transit and primary markets may not. Appellants are not complaining because of the manner in which the combinations are constructed or that such rates, in themselves, are unreasonable, but complain that it is unreasonable, discriminatory and unduly prejudicial to require the primary markets to transit on such higher combinations (no matter how constructed) while interior points may transit on the same combinations, but also upon lower through rates. It is perfectly absurd to argue or insinuate that such discrimination does not exist because of the manner in which the higher combinations were determined.

It should be understood that the average of transit balances referred to *is not an average of any existing*

balances but an average of the balances which *would* result if there were no proportional rates and transit were allowed only on the basis of the reasonable through rates and reasonable inbound rates which the Commission might determine (205 I. C. C. 328).

When the rate-break markets are allowed the alternative use of balances which are lower than their proportional rates, they will merely be put on the same basis as interior markets, which are now allowed the alternative use of the rate-break combinations and the lower through rates, whereas the primary markets are confined exclusively to the use of the rate-break combinations.

The fallacy of the appellees' argument is also clearly shown by the fact that there can be only one balance from any one transit point under any one through rate, and there can be no "offset" of a high balance against a low balance unless more than one through rate is considered. But more than one situation can not be considered. To determine the existence of unjust discrimination or undue prejudice the question is whether one person pays more for a haul than another, receiving the same service. There is no authority in the act for "offsetting" one situation against another.

The record in the formal complaint cases shows that shippers both at interior points and at primary markets pay the same combinations except in the numerous instances complained of in which shippers at interior markets pay through rates which are always less than the combinations and never more.

The orders of the Commission are not in anywise based on the point which defendants now seek to establish by implication. Since we are here questioning the orders as being improperly founded, as shown by the reasons given by the Commission, the argument and implications of the defendants and interveners could not be material or relevant even if well founded.

Moreover had there been any grounds for contending that discrimination does not exist because of the manner in which the rates were constructed, the Commission would, obviously, have said so. It did not do so.

It is evident that this point, like every other made by the opposition, when properly analyzed, leads to the same conclusion, and that is that the primary markets are suffering discrimination and prejudice for which there is no justification either in the facts found by the Commission, or deducible therefrom.

3. Intricacies of rate structure are unduly emphasized.

Appellees stress the intricacies of the rate structure. They insinuate that such structure and the proportional rates originated with the First Grain Case. This is intrue. The rate-break had existed at the primary markets for years and was the result of competitive factors, the location of such markets and their situation with reference to the lines of the various carriers. The rate structure was the result of a natural development extending over many years.

It is true that such rates are interrelated, but all these matters have no significance here. Appellants do not attack the rate-break combinations, as such, nor the manner in which they originated or are constructed. We contend that these considerations are not relevant, that regardless of the manner in which such rates were constructed there is no justification for allowing interior points to transit on different and lower rates, as well as on the combinations, while the Appellants are held to the higher combinations, particularly in view of the fact that the only excuse or justification for this treatment was to enable some carriers, whose lines constituted the routes through the primary markets to share in the business and to enable interior points on the same routes as the primary markets to transit on lower rates because other interior points on entirely different routes did so.

4. Transit at the primary markets is not as liberal as at interior points.

Throughout their briefs, the Appellees and Texas interveners have insinuated and argued that transit at the interior points is "restricted" while it is much more liberal at primary markets.

Counsel says that "under the rate-break system, the primary markets are accorded full and liberal transit privileges," but they are not as full and as liberal as those accorded the interior points. The latter can transit on through rates which are lower than the rate-break combinations, while the primary markets must transit exclusively on the higher combinations, and interior points are permitted to transit on the inter-market proportional rates, while intermediate primary markets are denied the right to do so, thus making it necessary for them to pay even higher rates than the rate-break combinations on the first primary market.

These are the things the primary markets are complaining about and it does not satisfy the requirements of the law to say that they have full and liberal transit privileges, when competing interior points have fuller and more liberal transit privileges.

The opposition also tries to give the impression that transit on the lower through rates is relatively unimportant. This hardly conforms with statements to the effect that to permit such transit at the primary markets would disrupt the rate structure and that the transit requested would "cover the main body of rates on grain and grain products through the several rate-break markets."

The fact is that, while there are relatively few overhead rates, they are of the greatest importance because a large volume of grain moves on them. All interior points can transit on such rates and it is impossible for the primary markets to compete unless they are permitted to do likewise.

It does not help the Commission's case, therefore, to say in one breath that the instances in which the primary markets are denied transit are relatively unimportant and, in another, that they cover the main body of rates on grain and grain products. Neither one of these contradictory statements is entitled to consideration. Whether the instances are few or cover the main body of rates merely indicates the degree of the inequalities, and complainants are entitled, as a matter of law, to have all inequalities removed.

The fundamental purpose of the Interstate Commerce Act was "to compel the carrier as a public agent to give equal treatment to all;" "to cut up by the roots every form of discrimination, favoritism and inequality"; and to "place all shippers upon equal terms." *New Haven* v. *I. C. C.*, 200 U. S. 361, 392; *L. & N. R. Co.* v. *Mottley*, 219 U. S. 467, 478; *United States* v. *Union Stock Yards*, 226 U. S. 286.

In the *New Haven case*, this Court said:

> "It cannot be challenged that the great purpose of the Act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism, * * *"

The Commission's decisions and orders in the present case are in violation of the fundamental principles announced by this Court in the cases referred to, and should therefore be declared null and void.

5. Respecting rate situations set out in appellants' brief.

Appellees say that the rate situations, illustrated by the charts introduced in the trial court (R. 723-728), are misleading and that there is no proof that transit is granted under the rates in question without extra charge at the interior points on the indirect routes shown on these charts.

There is no basis for this criticism. Before this case was submitted to the trial court, counsel for Appellants agreed with counsel for Appellees that it would be desirable to simplify the situation and that certain illustrations should be submitted as representative of the effect of the Commission's orders. In the trial court, counsel for Appellee agreed that the situations illustrated by the charts, truly reflected the effect of the Commission's orders, except in certain unimportant respects (R. 710-711). Accordingly, the present criticism seems most extraordinary under the circumstances.

The testimony before the trial court with respect to these charts was that they illustrate the effect of the Commission's orders on the various parties who brought this suit. It was proper that the parties show how the orders of the Commission affected them.

B. & O. R. R. Co. v. *U. S.*, 68 L. Ed. 667, 264 U. S. 258.

Galveston H. & S. A. Ry. Co. v. *U. S.*, 222 Fed. 175.

Nashville Grain Exchange v. *U. S.*, 191 Fed. 37.

The testimony was that the various maps show representative routes and the location of transit points. All routes were not shown because to do so would make a very complicated map. It was Appellants' desire to simplify the situation as much as possible, so as to avoid unnecessary confusion (R. 712-715).

II.

The Findings of Commission Are Not Conclusive.

The statement is repeatedly made in the brief for the Commission that its findings that the existing transit adjustment does not unjustly discriminate against or unduly prejudice the primary markets are conclusive and may not be questioned by the Court. But this is not correct, as indicated by the discussion in our original brief,

at pages 33 to 39, and the cases there cited, as will further appear from the following discussion.

Counsel also state that whether a preference or advantage is undue or unreasonable is a question of fact to be determined by the Commission. While this is generally true, such findings must be supported by evidence and comply with the Commission's lawful authority under the Act; otherwise there is an abuse of power. *Manufacturers Ry. Co.* v. *U. S.*, 246 U. S. 457, 481.

Reference is made to the recent decision of this Court in *U. S.* v. *Trucking Co.*, 310 U. S. 344, in which the opinion quotes approvingly from *U. S.* v. *L. & N. R. Co.*, 235 U. S. 314, that where a court substituted "its judgment as to the existence of preference for that of the Commission, on the ground that where there was no dispute as to the facts it had a right to do so (the court), obviously exerted an authority not conferred upon it by the statute." The implication is that where there is no dispute as to the facts the conclusions to be drawn therefrom are exclusively for the Commission and they they cannot be questioned in any manner.

But the case from which the statement in the opinion is quoted does not so hold as an absolute proposition, for the Court there said that it would have to go further and determine whether the action of the Commission was repugnant to the Constitution, in excess of the powers which that body possesses, or what is equivalent thereto, wholly unsustained by proof.

Our contention here is that the Commission exceeded its powers under the Act by attempting to correct a situation which it deemed improper in an unlawful manner —by violating the express provisions of the statute against discrimination and prejudice, and also, that the Commission's findings and conclusions are wholly unsustained by proof, because the fundamental and controlling facts show that there is no difference in the transportation serv-

ice or the cost thereof, and hence calls for a conclusion directly contrary to that reached by the Commission.

Incidentally, that case (*U. S.* v. *L. & N. R. Co., supra*) involved the question whether Atlanta, Georgia, and other points, were entitled to the same reshipping (transit) privileges on grain as Nashville and other points. The Commission had held that the granting of such privilege to Nashville, while refusing it to Atlanta, was an undue and unreasonable preference to Nashville, in violation of Section 3 of the Act. The then Commerce Court, because the privilege was of long standing and justified by water competition at Nashville, had declared it to be not unlawful and not preferential.

The Court reversed the Commerce Court and sustained the Commission, thus approving its conclusion that there would be discrimination and prejudice against Atlanta unless it had the same reshipping privileges as Nashville, thereby directly sustaining our contentions.

The opinion of the Court in that case says that findings of the Commission are conclusive in case of judicial review, except to the extent pointed out in the *Illinois Central case,* 215 U. S. 452, 54 L. Ed. 280, where the court said:

> "Beyond controversy, in determining whether an order of the Commission shall be suspended or set aside, we must consider (a) all relevant questions of constitutional power or right; (b) all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and (c) a proposition which we state independently, although in its essence it may be contained in the previous one, viz., whether, even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power."

While the orders in question may be within the scope of the delegated authority under which they purport to have been made, the authority has been exercised unlawfully and in such an unreasonable manner that it may truthfully be said that the shadow, instead of the substance, has determined the exercise of the power and that it is therefore invalid.

If an order rests upon an erroneous rule of law, or is based upon a finding made without evidence, or upon evidence which clearly does not support it, the order must be set aside. *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420.

The doctrine that findings of fact made by the Commission must be accepted in case of judicial review does not relieve the Courts from determining whether statutory powers conferred have been transcended or have been exercised in such an arbitrary way as to amount to the exertion of authority not given. This but expresses the elementary principle that an investiture of a public body with discretion does not imply the right to abuse, but on the contrary carries with it as a necessary incident the command that the limits of a sound discretion be not transcended, which by necessary implication carries with it the existence of judicial power to correct wrongs done by such excess. *Intermountain Rate Cases*, 234 U. S. 476, 58 L. Ed. 1408.

Counsel cite *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, in which the Supreme Court said that whether a preference or advantage or discrimination is undue or unreasonable or unjust is one of those questions of fact that have been confided by Congress to the judgment and discretion of the Commission, and upon which its decisions are not to be disturbed by the Courts, except upon a showing that they are unsupported by evidence * * * or for some other reason amount to an abuse of power. The Court thus recognized that the findings of the Commission are not conclusive in all instances.

That case is worthy of further consideration here. There the Commission approved a charge in excess of the line-haul rate to industries located on the Manufacturers Railway while the carriers continued to absorb the charges of the Terminal Railway, and held that this was not undue or unjust discrimination.

The Court sustained the Commission, but this was based entirely upon differences in transportation and physical conditions as between the two industrial railways, which was held by the Commission to justify the difference in charges. The Court stated at page 482:

> "In the present case the negative finding of the Commission upon this question of undue discrimination was based upon a consideration of the different conditions of location, ownership and operation as between the Railway and the Terminal."

In the present case there is no difference in transportation conditions justifying a difference in rates and transit privileges, and hence the conclusion must be contrary to that reached in the *Manufacturers Railway Case.*

We have already called attention to the case of *United States* v. *Illinois Central*, 263 U. S. 515, 68 L. Ed. 417, in which the Court sustained the Commission in holding that all lumber mills within a territory from which blanket or group rates generally apply are entitled to the same rates. It was in that case that the Court said that a difference in rates is illegal unless it is shown that it is justified by the cost of the respective services, by their value or by other transportation conditions. Since the Commission had found that there was no difference in these respects, its order requiring a parity of rates was sustained.

That case is on all fours with the present case. Here the Commission denies to the primary markets the right to transit on the same rates as interior points and compels them to pay higher rates, just as some of the lumber

mills in the *Illinois Central Case* were denied the right to ship on the group rates and were required to pay higher rates.

The conclusion in the present case is directly contrary to that in the *Illinois Central Case*. In that case the Commission correctly found that there is discrimination and prejudice for reasons which parallel and are practically the same as the contentions we make in this case, where it reached a directly contrary conclusion. Every fact mentioned and every reason given in that case sustain our contention in the present case and show how illegal and arbitrary the action of the Commission is in the present case.

The case of *Virginian Railway Co.* v. *United States*, 272 U. S. 658, involved the question as to whether all of the mines in a blanketed territory are entitled to the same rates. The Commission had found that the rates were unjustly discriminatory to some points because they had to pay a combination of rates while other mines had through rates on the group basis.

The Supreme Court said that whether a rate is unjustly discriminatory is a question on which the finding of the Commission, supported by substantial evidence, is conclusive, *unless there is some irregularity in the proceeding or some error in the application of rules of law.* It sustained the Commission, because there were no differences in transportation conditions as between the different points in the blanketed territory, and the equality of rates which the Commission had ordered was therefore found justified. Just so should an equality of rates and transit privileges be ordered within the blanketed territory in the present case, and any orders of the Commission which do not require equality are contrary to the principles of law established in the three cases mentioned, and therefore null and void. It is significant that these and other cases which we invoke as sustaining our posi-

tion in the present case are cases in which this Court has sustained the Commission in making exactly the same contentions as we make here. In the present case, the Commission has actually created unjust discrimination and undue prejudice upon facts identical with those in which, in other cases, it has found unjust discrmination and undue prejudice and ordered it removed.

For this Court to grant the relief sought requires the Court to do no more than it did in *Mitchell* v. *United States*, 313 U. S. 80. There too, the Commission contended that its findings of the absence of unjust discrimination and undue prejudice were binding and that the Court would invade the administrative field, if it did not recognize them. This Court held, however, that the discrimination shown was palpably unjust and forbidden by the Interstate Commerce Act and that the Commission's finding that the discrimination was "plainly not unjust or undue" could not be sustained because it was based upon the finding that there was "comparatively little colored traffic" and, therefore, was in violation of the law, as it was the purpose of the Act to eliminate all discrimination. So here, the Commission's finding of the absence of undue prejudice and unjust discrimination is in fact based upon the erroneous ruling that the competitive advantages of rate-break markets justify different charges for the same transit service and upon other erroneous rulings.

III.

The Differences in Conditions Relied Upon by the Commission As a Basis for a Difference in Treatment of Primary and Interior Markets Are Legally Insufficient to Support the Commission's Orders.

At the beginning of their discussion of their point II Appellees correctly state our contentions as follows:

> "Under the proportional rates prescribed by the orders for application from the primary markets,

transit is permitted at all intermediate points on the route except a primary market. Denial of the transit at the intermediate primary market results in a higher rate than that applicable when transit is taken at an intermediate interior point. The transportation and transit service and the cost thereof is the same whether transit is taken at an intermediate interior point or at an intermediate primary market. There is, therefore, an obvious discrimination, in violation of Sections 2 and 3 of the Interstate Commerce Act, and there is no room for the exercise of administrative judgment. The Commission therefore erred as a matter of law in finding that this inequality was not unjustly discriminatory and unduly prejudicial in violation of Sections 2 and 3 of the Act."

We have quoted this because it presents the fundamental issues here involved and because we wish to reply to the argument by which counsel seek to refute the soundness of these contentions in the order in which they appear in their brief.

It is first claimed that the argument is unsound "because it assumes its factual basis, since there was no finding by the Commission that the transportation and transit service and the cost thereof is the same at the respective points."

It is rather surprising that counsel should make such a statement in the face of the obvious and self-evident fact that the transportation and transit service and the cost thereof are exactly the same at interior points as at the primary markets when the traffic moves over the same routes and substantially the same when the points are located on different routes.

But we do not have to rely on obvious facts, because the Commission has confirmed them by its own statements as perforce it had to do if it was going to express itself upon the subject at all.

It said in the original report (164 I. C. C. 634, R. 42) that "the transportation service, recording of freight

bills, keeping of records and all incidents of the entire transaction of shipment to and from the primary market are the same whether the outbound shipment is at the transit balance or the proportional rate," and, of course, there is no difference between transit on a proportional rate at a primary market and at an interior point.

This was recognized and stated by the Commission when it described the mechanics of transit under one-factor through or overhead rates and then said that these are the mechanics of transit also under the rate-break combinations (215 I. C. C. 90, R. 538).

We repeat, therefore, that there is no difference in the transportation and transit service or the cost thereof. No one claimed that there was at the hearings in the *Grain case* and it is not only obvious that there is not, but the Commission has so found.

Since there is no difference in the service or the cost thereof, there is absolutely no justification for a difference in rates. The Commission has no right under the law to require that one point on a route shall pay higher transportation charges in order to transit than another point on the same or a comparable route.

If the soundness of our argument in this respect depends upon the actual factual basis that there is no difference in the transportation and transit service or the cost thereof, as the Commission impliedly concedes, then we submit that it is absolutely sound and that this is determinative of the case.

Counsel for the Commission recognize the force and validity of this contention, but immediately resort to certain incidental matters which, in view of the patent discrimination which exists, are really not substantial and do not justify the discrimination.

They say that our contention in this respect disregards numerous relevant facts and circumstances found by the Commission which formed the basis of its conclusion and decision as follows: (1) That there is a difference

in the rate bases applying when transit is taken at the respective points; (2) that there is a difference in the form of transit; (3) that there is a difference in advantages resulting from the different rate bases and the different forms of transit.

As to the difference in rate bases, it is pointed out that under the rate-break combinations there is a constant outbound factor from the primary markets, known as the proportional rate, while at interior points the outbound shipment is on a transit balance. But what difference does this make when the total transportation charges in each instance would be the same? The rate-break combinations are published as through rates and interior points transit on them as well as the primary markets, the only difference being in the factors. Surely this difference in the construction of the rates does not justify denying the primary markets the right to transit on through rates lower than the combinations when interior points are permitted to do so.

In other words the only difference in the rate bases at primary and interior points, is that, while shippers at both points transit on the same rates (except as to the numerous exceptions complained of as to which shippers at interior points transit on lower rates), shippers at the primary markets pay the inbound rates, plus outbound fixed proportionals, while shippers at interior points pay the same through rates, which, however, consist of the inbound local rate to the transit point, plus a transit balance therefrom, which is in each case the difference between the combination and the inbound local.

The fact that the proportionals are fixed and definite, means simply that the rates break at the primary markets. On the other hand, under transit on the through rates applicable at interior points, since the transit balance is the difference between the inbound rate and the total through rate, it varies because the inbound rates from various points of origin vary. The fact that the out-

bound proportionals are fixed and constant in amount is said to be beneficial to shippers at primary markets in that shippers at such points have a greater selection of carriers. They may choose any of several carriers, anyone of which will carry the shipment at the proportional rate. These differences and the alleged benefits therefrom are relied upon by the Commission as constituting a basis for a difference in treatment and these matters are discussed at length in 215 I. C. C. 91, 92 (R. 539, 540). This portion of the Commission's opinion is copied at length in Appellees' brief. Since its decision reported in 215 I. C. C. 83 (R. 532) the Commission has loosely referred to this general situation as creating a difference in the "forms of transit" but the opinions show that there is actually no such difference. Thus in 215 I. C. C. 90 (R. 538), the Commission described the mechanics of transit on one-factor through rates and then said:

> "The foregoing are the mechanics of transit also under the rate-break combination, except that the outbound shipment under that combination is on a definitely published constant factor, instead of on the unpublished and varying difference between the 1-factor rates to the transit point and to final destination."

And in 164 I. C. C. 634 (R. 42), the Commission said that:

> "The transportation service, recording of freight bills, keeping of records, and all incidents of the entire transaction of shipment to and from the primary market are the same whether the outbound shipment is at the transit balance or the proportional rate."

And in the same report (R. 62) the Commission stated:

> "A stop at a primary market from which there are proportional rates will be viewed as any other transit stop."

It is obvious from the foregoing that when the Appellees talk about "differences in the rate bases" and "in the form of transit" and of "differences in advantages" they refer, as did the Commission, solely to the fact that the rates break at the primary markets and do not break at interior points. Assuming the existence of the alleged advantages referred to by the Commission (as we must under the findings of the Commission), the important question is whether or not they constitute any basis for imposing higher rates at such rate break markets than at interior points. Appellants contend that, as a matter of law, they do not and that the Commission's vew that they do is erroneous for two principal reasons:

1. Rates break at the primary markets because of their advantageous geographical location and their situation with respect to the lines of various railroads, and the Commission has no power or authority to equalize or off-set any such competitive advantages.

2. Even if any advantage exists because the primary markets have the rate break or because of any other factors, this is no lawful basis for creating a discriminatory, prejudicial adjustment for the purpose of off-setting the alleged advantages as it is the function and purpose of Sections 1(5), 2 and 3(1) of the Interstate Commerce Act to uproot all discriminations, rather than to create discrimination for the purpose of off-setting advantages of other points.

Referring to 1 above we have shown in our principal brief (page 57) that the breaking of rates, the limitations as to out-of-line and back-haul movements and the requirement that outbound movements at interior points be held to the lines of inbound carriers, are all the result of natural competitive conditions prevailing at interior and rate break markets. We have discussed and quoted at length from a number of decisions of the Commission recognizing such facts to be true and directly holding that

the Commission has no power or authority to off-set or equalize such advantages in any manner (Brief 58 to 69).

Sioux City Terminal Elevator Co. v. *Chicago, Milwaukee & St. Paul Railway Co.*, 23 I. C. C. 98.

Wichita Board of Trade v. *Abilene & S. Railway Co.*, 29 I. C. C. 376.

Iowa Railroad Commission v. *Director General*, 63 I. C. C. 405.

Helena Traffic Bureau v. *Missouri-Pacific Railroad Company*, 89 I. C. C. 405.

That this is the view of the Commission is shown by the original report in the *Grain Case* (164 I. C. C. 669, R. 77) where, in discussing the rate adjustment at Des Moines, the Commission said:

> "The situation at Des Moines amply demonstrates that conditions at the primary markets create the proportional rates, rather than that the proportional rates create the primary markets."

We have also set forth and discussed various decisions of this court and the lower federal courts holding that the Commission exceeds its power and authority when it seeks to off-set or equalize such natural advantages as may be possessed by rate-break markets (Brief 69 to 79).

Southern Pacific Co. v. *Interstate Commerce Commission*, 219 U. S. 433.

Texas & Pacific Railway Co. v. *U. S.*, 289 U. S. 627..

United States v. *Illinois Central R. Co.*, 263 U. S. 515.

Anchor Coal Co. v. *U. S.*, 25 F. 2d 462.

Having discussed such alleged advantages, Appellees entirely fail to discuss the principal points made by Appellants. They have no answer for the fact that the Commission and the Courts have held many times that the alleged advantages are due entirely to natural competitive factors which cannot be the basis for a difference

in treatment. They ignore the decisions relied upon by Appellants. Under a separate point (number V) they contend that "The orders in question do not disturb natural advantages of rate break markets." Under this point they say:

> "Perhaps it may be conceded that because of their location, the number of railroads serving them, the existence of storage capacities for a hugh volume of grain, and the fact that they are great primary mrakets, it is logical, convenient, workable, and perhaps 'natural' that the rates should break on these markets. The Commission fully recognizes this, since it adopted the rate-break system of rates on grain through these markets after exhaustive investigation and consideration. But it would not seem that the primary markets are entitled to that particular form of rates, as a matter of law. While under the Act they are entitled to reasonable rates that are free from unjust discrimination and undue prejudice, it can hardly be challenged that the form of the rates, whether they shall be combinations or overhead through rates, is a matter within the administrative discretion and judgment of the Commission."

Keeping in mind the fact that the principal point is whether the Commission could lawfully seize upon the alleged advantages as the basis for excusing and justifying higher rates for transit at the primary markets, it will be seen that Appellants evade the point entirely and have never answered it. Obviously, the reason no attempt is made to answer the point, or to explain the decisions relied upon by Appellants, is because the decisions discussed at length in our brief show clearly that the Commission has in fact found no differences in conditions which constitute any lawful basis for the difference in treatment which it prescribed.

Appellees argue that the rate-break markets are not entitled to transit on both rate-break combinations and overhead through rates "especially when the outbound component of the rate break combination—the propor-

tional rate—is fixed by the Commission at a substantially lower level than that previously in effect *in consideration of the elimination of the lower transit balances.*" We have heretofore pointed out that this argument is erroneous and entirely misleading for the reason that the interior markets transit on the same combinations, so constructed as the average of transit balances, but are also permitted to transit on lower through rates. The proportional rates are not the average of existing transit balances. All that shippers at primary markets want is that they be permitted to transit on the lower through rates, as well as upon the combinations because their competitors at interior points do so.

The second point made by Appellants (Brief 79) is that even if any advantage exists because the primary markets have the rate break, or because of any other factors, this is no lawful basis for creating a discriminatory prejudicial adjustment for the purpose of off-setting the alleged advantages as it is the function and purpose of Sections 1(5), 2 and 3(1) of the Interstate Commerce Act to uproot all discriminations, rather than to create discrimination for the purpose of off-setting advantages of other points. Appellants have no answer to this point. The authorities discussed in our principal brief (pages 79 to 83) show that if such advantages as were referred to by the Commission actually exist, they constitute no basis in law for creating the prejudicial discriminatory adjustment authorized by the Commission. The Courts and the Commission have frequently held that one discrimination or prejudicial adjustment cannot be justified by the alleged existence of another and that the fundamental purpose of the Interstate Commerce Act is to cut up by the roots every form of discrimination (See appellants' brief pp. 79-85).

Again we submit that, even if the rate-break were of advantage to the primary markets, that would not justify a difference in transit privileges as between them and interior points, for several additional reasons.

First, there is no relationship between the form of the rates and transit. They are not factors of the same character, and an advantage in one may therefore not be offset by a disadvantage in another.

Second, even if this could lawfully be done otherwise, there would be no way of measuring the advantage of one and the disadvantage of the other so that the attempted equalization could be brought about in that manner.

(a) The Commission's holding that to allow interior points to transit on the lower through rates would unlawfully discriminate against the primary markets and its subsequent reversal of such holding indicates the weakness of the Commission's ruling.

Appellants pointed out that, while the Commission held in the First and Second Grain cases that all interior points on routes through rate-break markets should not be permitted to transit on the lower through rates because this would "discriminate against the market in favor of the other intermediate points" (R. 240), the Commission thereafter reversed this holding and held that interior points on routes passing through the primary rate-break markets should be permitted to transit on the lower through rates and would not be held to the higher rate-break combinations. 215 I. C. C. 93 (R. 541).

Appellees say (point II(a)) that the earlier holding "must be deemed withdrawn in view of the subsequent modification."

They treat the matter as merely a change in administrative view, but can it be disposed of so lightly? The finding that to permit interior points on rate-break routes to transit on a lower basis would discriminate against the primary markets is a finding of law as applicable to certain facts. Of course the courts and the Commission too may make mistakes in the determination of the law and frequently reverse themselves by showing good reason therefor. Was any reason shown here? Not at all. The only justification for ignoring the Commission's orig-

inal holding that undue discrimination would result to primary markets if interior points on the same route were given the lower transit rates was that the Commission recognized that it was discriminatory to place some interior points on a different basis than other interior points, even though they were not on the same route.

The cases cited by the Commission are cases where there was a reversal of administrative rule or factual findings and such cases are not in point.

This circumstance may seem to be of little importance, but its significance is great as it indicates that the alleged differences in conditions which the Commission relied upon to justify its change of view are insubstantial and were resorted to solely for the purpose of enabling the Commission to give some relief to certain interior points against the same type of discrimination which Appellants are now complaining of.

In arriving at that change of view, the Commission relied upon differences between the rate-break and the through rates, and the principal and primary point in this case is whether or not such differences justify the difference in treatment. Those differences have been shown to be unsubstantial and the advantages resulting to the primary markets due entirely to their advantageous geographical location and their competitive situation particularly with respect to the lines of various carriers. We have shown that the courts and the Commission have repeatedly held that these alleged advantages are an insufficient basis for a difference in treatment. Rather than direct themselves to this principal point and to the authorities relied upon, Appellees and Interveners have tried to drag into this case all manner of incidental and inconsequential matters for the purpose of beclouding the real issue.

IV.

The Commission's Conclusion That the Relief Sought Should Be Denied Because to Allow It Would Disturb and Disrupt the Rate Structure, Reestablish the Dual System and Impose an Additional Burden upon the Carriers, Is Insufficient in Law to Support the Commission's Orders.

Appellants have contended (Br. 83-94) that in a case like this where different charges are made for the same transit service (a situation which the courts and the Commission have always held to be unlawful) it is no lawful basis for failing to remove such discrimination that to do so may disturb and disrupt the rate structure or impose an additional burden upon the carriers.

Appellees contend, however (Points III and IV), that these matters were properly considered and they argue that the Commission has the power to consider such matters and that "the term 'transportation conditions' is very broad" and "undoubtedly means much more than operating conditions or conditions relating merely to the physical movement of the traffic." Appellees' contentions are unsound for the reasons discussed below:

1. While the preservation of a rate structure and the revenue of carriers may be proper considerations in some cases, they constitute no lawful excuse or justification for condoning a substantial discrimination whereby shippers at primary markets are charged higher rates for the same transit service as is accorded to their competitors at interior points on the same and other routes.

We do not contend that these matters may not be proper considerations in the disposition of some matters presented to the Commission. We contend, however, that these have no bearing in determining whether unjust discrimination and undue prejudice exist where different charges are made for the same service. We further contend that the opinions of the Commission show beyond any question that it denied relief because of its desire to preserve the rate structure and the revenue of the car-

riers rather than upon a finding of any real or substantial difference in conditions between interior and rate-break markets which could lawfully sustain the difference in treatment which was prescribed.

Appellees cite and quote from a number of decisions. The language quoted from these cases merely shows that in the creation of rate adjustments and the exercise of other administrative powers the Commission exercises a broad discretion in determining what is a proper and beneficial adjustment. This is true, but these considerations do not give the Commission any power to justify a substantial disparity in rates for the same service, forbidden by Sections 2 and 3(1). As stated above we contend that it clearly appears from the Commission's reports that the controlling reason the Commission denied complainants relief was because of its desire to protect a rate structure and the revenue of carriers at the expense of the primary markets.

Section 2 of the Interstate Commerce Act provides that no greater charge for any service shall be made against one person than against "any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic or message under substantially similar circumstances and conditions" and that such charges constitute "unjust discrimination." Section 3(1) forbids any undue or unreasonable preference or advantage to any particular person, company, locality, or transit point, or any particular description of traffic.

Under these sections it is uniformly held that unjust discrimination and undue prejudice result if different charges are made for substantially similar services (See the cases discussed in complainants' brief, pp. 41-53).

The cases cited and discussed in our brief (pp. 85-91) show that, in a case like this, such considerations as the preservation of a rate structure and the revenue of

carriers are insufficient to constitute a lawful basis for denying relief. Upon reading the applicable portions of the Commission's opinions, this Court will readily see the undue emphasis which the Commission placed upon such considerations to the exclusion of the primary issue, viz., whether the differences in conditions are actually sufficient under the law to justify the difference in treatment which was prescribed.

Appellees argue that the Commission found that to grant the relief sought would reestablish the dual system at the primary markets. We have heretofore pointed out in our principal brief (pp. 91-94) that if the Commission is directed to grant the relief sought it has the power to keep the situation under control so that the unrestricted dual system is not reestablished and the rate structure not unduly affected; that it has done so in numerous similar cases and that this Court in *U. S.* v. *C., M., St. P. & P. R. Co.*, 294 U. S. 499, has recognized in a similar case that "the danger is illusory. The whole situation is subject to the power of the Commission which may keep the changes within bounds." 294 U. S. l. c. 509.

Moreover, as the record shows, the Commission ordered the cancellation of all through rates except those made necessary by carrier competition, which had the effect of reducing the transit balances to a minimum, and these would not tend to disrupt the rate structure.

This was the view of a majority of the Commission in the first report in the formal complaint cases, 223 I. C. C. 235, where at page 244 (R. 624) the Commission said that this is not a "general attack on the new structure as such," and that what is urged is "to make these particular changes to meet demonstrated difficulties, which changes *will not adversely affect the structure as a whole*" (Emphasis ours).

However, if it were a fact that transit balances tend to disrupt the rate structure and reestablish the dual system that would not justify an order by the Commis-

sion which clearly results in discrimination and prejudice as between different points, for two primary reasons.

First, because, as stated above, the effect of transit balances upon the rate structure constitutes no legal ground for a difference in transit privileges as between rate-break and interior points. *United States* v. *C., M., St. P. & P. Ry. Co.*, 294 U. S. 499.

Second, because the Commission has no right to correct a situation which it deems to be improper by violations of the Act. If the results of transit balances are detrimental and should be corrected, that must be done in a lawful manner. The Commission has no right to correct a situation which it regards as unlawful by creating another one that is unlawful.

However, the Commission's objection to the dual system was based on the statement that transit balances less than the proportional rates give an undue preference to the users of transit balances over the users of proportional rates, which is clearly erroneous as a matter of law, because all shippers located at the primary markets have the same opportunity to use transit balances or proportional rates. This point is fully discussed at pages 102 to 105 of our original brief.

The same argument as made above applies to the finding emphasized throughout Appellees' brief that transit balances at the primary markets would tend to reduce the revenues of the carriers. That could also be questioned as a matter of fact, but we rely upon the contention that, even if transit balances tend to reduce the revenues of the carriers, that furnishes no justification for prescribing a difference in the transit privileges. The Commission has fixed the rates in this territory, and if to permit all points to transit on the same basis results in inadequate revenues, the remedy lies with the Commission. But this must be done in a lawful manner, and not by creating discrimination and prejudice as be-

tween shippers and localities. This subject is also fully covered in our original brief at pp. 85-91.

Incidentally, we wish to point out that the carriers contended at the hearings in the Grain Case that the denial of transit at the primary markets on the through rates would not result in any increase in their revenues which would offset the reductions in the rates ordered by the Commission, as indicated by the last paragraph in the report in 205 I. C. C., at page 335 (R. 313). However that may be, the primary markets are entitled as a matter of law to transit on the same rates as interior points regardless of what the level of the rates may be.

Moreover, the great emphasis which Appellees put upon these considerations and which they reiterate time and again throughout their brief is wholly unwarranted for the following additional reasons:

2. Granting appellants the relief sought would merely permit them to transit on the same basis as interior points and would give them no advantage over such interior points.

(a) *Substitution of billing not limited to primary markets.*

In the brief for the Commission repeated reference is made to the fact that if Kansas City, for illustration, were permitted to transit on the 16c proportional rate from Omaha to Chicago, the transit balance would be 9 1/2c. The impression is sought to be given that this is a very serious matter, when the fact is that Kansas City pays the full proportional rate from Omaha to Chicago, which applies over routes through that point and on which interior points are permitted to transit in the same manner.

While the outbound balance would be 9 1/2c, the Kansas City operator has paid 6 1/2c for bringing the grain from Omaha, and hence pays the full proportional rate of 16c. There is absolutely no distinction between this and transit now permitted at Independence, Missouri, just outside the switching limits of Kansas City, except that

an operator at Independence would pay the 16c rate in different factors. He would pay 10c to bring the grain from Omaha to Independence and then the balance of 6c to Chicago, making the through rate of 16c.

St. Louis, which is an important grain and milling center, would pay 14c for bringing the grain from Omaha and then a balance of 2c to Chicago, making the through rate of 16c.

There is absolutely no difference in principle as between transit at any of these points, yet an operator at Kansas City, under the present orders of the Commission, would have to pay 22 1/2c for exactly the same transportation and transit service.

But, they say, if an operator at Kansas City is permitted to transit on the same basis as an operator at the other points, he could bring grain from a point in Kansas and ship it to Chicago at a balance of 9 1/2c, thus defeating the proportional rate of 16c. This overlooks the fact that he would pay 6 1/2c to bring the grain from Omaha and that when he paid 9 1/2c for transportation to Chicago, he would pay the full proportional of 16c.

But the important point is that an operator in Independence, or St. Louis, or Dubuque, or Cedar Rapids, or any other interior point, operates in exactly the same way and can do exactly the same thing.

Throughout its various opinions the reports of the Commission show that shippers at interior points are permitted to transit on the lower balances as are illustrated in the various situations to which Appellees refer and that shippers at the primary markets are simply requesting that they be granted the same privilege.

As the Commission stated in the original report in the *Grain case* "preservation of identity of grain is not required" (164 I. C. C. 619, 633). And as Commissioner Meyer pointed out in his concurring opinion in the same report, "the interior transit points are free to select the most favorable transit balances" (p. 701).

In 223 I. C. C. 235, in response to the objections of interior transitors that if the markets are permitted to transit it will give them an advantage over the interior, because of the ability of the markets to select favorable billing and to substitute grain from one section for that of another, the Commission said:

> "Selection of billing and the opportunity to substitute one grain for another is inherent in all transit and is not peculiar to rate-break markets. We do not understand that the interior transitors desire to maintain the identity of each parcel of grain, or of the billing which goes with it, any more than do the shippers at the markets" (p. 242).

Notwithstanding all the discussion in the brief for the Commission, as to the effect of granting transit on the lower through rates at the primary markets, there is absolutely no distinction whatever between what that situation would be and the situation which now exists at any and all interior points.

If there is any difference it is not of kind, but of degree, because there are more inbound and outbound carriers at some of the primary markets than at some of the interior points, but this is a natural condition with which the Commission is not concerned and which it has no right to off-set by a difference in the rates on which transit is permitted.

(b) *Attitude of Intervenors not justified.*

The interveners who now oppose the restoration of transit on overhead rates at the primary markets made no contention in the *Grain case* that the primary markets should be deprived of transit. As stated by the Commission, at 223 I. C. C. 239 (R. ....):

> "* * * for 25 years or more prior to our order in the first *Grain* case, the requested transit had been in effect without complaint from anyone."

The interveners have evidently found that the unfair disadvantage under which the primary markets have been

placed results in advantage to them which they want to keep. We submit that since the establishment of transit at the primary markets would restore a condition that was satisfactory to all concerned prior to the *Grain case*, it should be satisfactory now, and that the contentions of the interveners are not entitled to consideration, because the primary markets are merely asking for equality of treatment.

In the brief of the Texas interveners they complain that if the relief sought is granted, shippers at primary markets may transit on the lower balances. Obviously the Texas interveners wish to hamstring their Kansas City and other competitors, but there is no justification for a difference in treatment.

The record shows that the Texas interveners located at Fort Worth operate on through rates from interstate points to Houston which reflect a balance of 6 1/2 cents from Fort Worth, while they also have rates from the Texas panhandle which are the same to both Fort Worth and Houston so that the transit balance in such cases is zero. By surrendering freight bills covering shipments from Panhandle points they obtain the additional transportation without charge.

.t is evident, therefore, that the interior points have no just grounds of objection. They now operate under the same transit privileges as complainants are seeking. This was recognized by the Commission when it said that most of the interior transit points "now operate on transit under the rates to which the complaining markets are seeking equalization by means of like transit" (R. 621).

The Commission has also specifically found that to grant transit to the primary markets on the through rates will merely place them on an equality with interior points. In the same report the Commission said (R. 618):

> "The relief sought will not change a single rate now in effect, but will merely permit the terminal

markets to transit on an equality with interior transit operators on the same rates over the same routes."

3. The entire argument of appellees erroneously insinuates that the need for preserving the rate structure, the revenue of the carriers and the elimination of the dual system required and justifies such discrimination as now exists against shippers at the primary markets.

Appellees and the Texas interveners erroneously insinuate that the need for preserving the rate structure, the revenue of the carriers and the elimination of the dual system require and justify such discrimination as now exists against shippers at the primary markets. This is most misleading, for while the above considerations induced the Commission to prescribe the rate-break combinations as the exclusive basis of charge at primary markets, nevertheless the discrimination complained of did not result from this action but has resulted because the Commission allowed numerous exceptions, viz., lower through rates upon which it permitted the interior points to transit but not the primary markets. The sole and only reason given for these exceptions was for the purpose of permitting carriers whose roads constituted the so-called "indirect lines" to share in the business (R. 53).

Moreover, as we have repeated many times, the discrimination complained of is in substantial part due to the subsequent action taken by the Commission whereby it refused to be bound by its rulings in the First and Second Grain cases and permitted interior points on rate-break routes to transit on the lower through rates, while the primary markets were held to the higher combinations. The elimination of the dual system, the preservation of the rate structure and the revenue of the carriers did not necessitate and were not the occasion for granting the privilege of transiting on the lower through rates to all the interior points located on the same routes as the primary markets. Such privilege was granted to the interior points solely in order to benefit such interior points

and put them on a better competitive basis with other interior points on the so-called "direct routes" although they were on the same so-called "indirect routes" as the primary markets and although this greatly increased and intensified the discrimination against shippers at primary markets.

V.

The Contention That the Primary Markets Are Not Damaged Is Based on an Attempted Justification of One Discrimination by Another Created by the Commission and Is Unsound and Arbitrary.

In refusing Appellants' request that the Commission place them on the same basis as shippers at interior points, the Commission erroneously stated, in effect, as the reason therefor that the advantage given to interior points on rate-break routes would not damage complainants because they were already under a competitive disadvantage with interior points on other than rate-break routes as a result of the Commission's orders. Appellees contend (Point VII) that the findings of the Commission in this respect were findings of the absence of substantial damage to complainants. The contention is unsound and misleading.

For many years prior to the decision in the Grain case, all points on any of the routes could transit on the same rates or basis. The Commission first deprived all points on rate-break routes of transit while permitting all points on other routes to transit as before. It prohibited transit at interior points on rate-break routes "in order not to discriminate against the (primary) market in favor of the other intermediate points" (173 I. C. C. 516, R. 240).

Later it authorized transit at interior points on rate-break routes because that "would remove discrimination between interior transit points themselves" (215 I. C. C. 92, R. 540) meaning between interior points on rate-

break routes and interior points on other routes. In doing so the Commission said in effect that the transit operator at the rate-break market would not be relatively more affected by transit at interior transit points on rate-break routes than by transit at points on other routes (215 I. C. C. 93, R. 541).

This means that the Commission first created discrimination against the primary markets by denying them the right to transit on the same basis as interior points on other routes and then used that discrimination as a justification for the additional discrimination created by placing interior points on rate-break routes on the same basis as interior points on other routes. The Commission said in effect that since the primary markets have already been damaged and injured, by our previous action, they will not be damaged or injured much more by additional discrimination.

In 229 I. C. C. 14 (R. 642), the Commission said that the granting of transit to interior points on rate-break routes "was at most merely an aggravation of a general competitive situation." The competitive situation referred to is the one it had previously created, when it prohibited transit at the primary markets while permitting it at interior points on other routes. When the Commission justified the additional discrimination created by granting transit to interior points on rate-break routes, it justified its action by the general competitive situation which it had previously created. The Commission sought to justify the new injury by pointing to the previous injury created by it, and thus compounded injury upon injury, by creating new disadvantages to the primary markets in favor of interior points on rate-break routes.

The evidence before the Commission showed that the primary markets were subject to much damage and injury because of the advantage given to interior points on rate-break routes.

The overwhelming undisputed testimony was that slight differences (even a fraction of a cent) decide the markets to which grain will go and the routes over which it will move; that differences in freight rates cannot be absorbed; that grain businesses at primary markets cannot compete with interior points if the substantial differences in transit charges be continued; and that the complainants and other shippers at the primary markets have lost much business and have been put to a great disadvantage by reason of the Commission's orders (See record in case No. 27628, pp. 65, 90, 91, 92, 102, 258, 423, 435, 529, 605, 810, 813, 1003, 1007, 1008, 1056, 1512-1515; see record in case No. 27580, pp. 398-424, 513-532, 616-628 723-731, 860-882, 957-961).

Moreover, even though it be assumed that the additional preference or discrimination be "minor," nevertheless it is unlawful, and the degree of the additional discrimination or preference does not excuse its unlawful character.

This proposition is directly supported by the recent decision of this Court in *Mitchell* v. *U. S.*, 85 L. Ed. (Adv.) 811.

There the Commission held that the discrimination against colored passengers and against plaintiff, in particular, was not undue and unjust, because there was comparatively little colored traffic. In repudiating this contention and in reversing the order of the Commission, this Court, in an opinion by Chief Justice Hughes said:

> "We take it that the chief reason for the Commission's action was the 'comparatively little colored traffic.' But the comparative volume of traffic cannot justify the denial of a funamental right of equality of treatment, a right specifically safeguarded by the provisions of the Interstate Commerce Act. We thought a similar argument with respect to volume

of traffic to be untenable in the application of the Fourteenth Amendment. We said that made the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of that right is that it is a personal one. *McCabe v. Atchison, T. & S. F. R. Co.*, 235 U. S. 151, 59 L. Ed. 169, 35 S. Ct. 69, *supra*."

VI.

Granting the Relief Sought Does Not Require That the Court Exercise the Administrative Function of Revising the Rate Adjustment.

Appellees contend (p. .....) that the relief sought should be denied because to grant it would require this Court to exercise the administrative function of revising the adjustment. This contention has no merit. It is based on the fact that the Appellants have asked the Court to set aside the orders of the Commission "in so far as the same require or permit a basis of transit" at the primary markets different from the basis at competing interior points.

The opinions and orders of the Commission covered numerous other matters not involved in this suit. If Appellants are right in their contentions, they are entitled to have only that portion of the orders set aside which bear on the discrimination and prejudice complained of. Obviously it was not only proper, but necessary that the Appellants seek to set aside only that portion of the Commission's orders dealing with the situation complained of. The statute under which this suit is brought expressly provides that the Court has jurisdiction to enjoin, set aside or annul "in whole or in part any order of the Interstate Commerce Commission" (28 U. S. C. A. 41 (28)). The same contention made by Appellees was urged in *C., M., St. P. & P. R. Co.* v. *U. S.*, 33 F. 2d 582. In rejecting it the court said (l. c. 589):

"Congress, however, conferred upon the court jurisdiction to enjoin or set aside so much of an order as is invalid. The statute (28 U. S. C. A., Sec. 41 (28)) confers jurisdiction over all 'cases brought to enjoin, set aside, annul or suspend in whole or in part any order of the Interstate Commerce Commission.'"

The method and mechanics of eliminating the existing unlawful discrimination is not the concern of this court. This Court passes judgment upon the challenged principles of law in so far as they are relevant, but it is not necessary and the Court will not attempt to direct the precise manner in which the administrative body will correct an unlawful situation. In *Pacific Power & Light Co.* v. *U. S.*, 307 U. S. 156, l. c. 159, the Court said:

"The court has power to pass judgment upon challenged principles of law in so far as they are relevant to the disposition made by the Commission. '* * * a judgment rendered will be a final and indisputable basis of action between the Commission and the defendant.' *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 38, 48 L. Ed. 860, 866, 24 S. Ct. 563. * * * For purposes of judicial finality there is no more reason for assuming that a Commssion will disregard the direction of a reviewing court than that a lower court will do so."

If the Court sustains the contentions of Appellants it will not attempt to tell the Commission exactly what it should do in an administrative way. It will see that its opinion is sufficiently clear that the Commission will not, through misunderstanding it, fail to give the full relief to which Appellants are entitled in the elimination of the unreasonable, discriminatory and unduly prejudicial transit practices now existing between rate-break points and all interior points.

CONCLUSION.

For the reasons discussed in our principal brief, and herein, Appellants respectfully submit that they are entitled to the relief sought and that the Court should direct the trial court to annul and set aside the orders of the Commission, as prayed in the Bill of Complaint.

Respectfully submitted,

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